No. 79-1617

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MICHAEL RODAK, JR., CL

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF OKLAHOMA ex rel. DEPARTMENT OF TRANSPORTATION OF THE STATE OF OKLAHOMA,

Petitioner,

VERSUS

MRS. C. V. PILE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

REPONDENT'S RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1617

STATE OF OKLAHOMA ex rel DEPARTMENT OF TRANSPORTATION OF THE STATE OF OKLAHOMA, Petitioner

v.

MRS. C. V. PILE, Respondent

RESPONDENT'S RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Mrs. C. V. Pile, Respondent herein, files this Brief in response to the Brief filed for the United States as Amicus Curiae, and she renews her prayer that Petitioners Petition for a Writ of Certiorari be denied.

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QUESTION PRESENTED

The primary question for consideration is whether or not the Oklahoma Out door Advertising Control Act (69 O.S. § 1271-1285) violates the Constitution of the United States if applied to Mrs. Pile's "non-commercial" billboard.

ARGUMENT IN RESPONSE TO BRIEF OF UNITED STATES AND FOR DENYING PETITION FOR A WRIT OF CERTIORARI

The Brief for the United States confuses the facts and the issues and then urges this Court to remand the case for clarification of the facts and the issues which have simply been confused by the United States' own Brief. Although the record may not be clear to the United States, it is obvious that the record is clear to the Petitioner who has not raised any of the factual or legal issues for clarification raised by the United States. For instance, Petitioner could have amended its Petition, alleged additional facts, and sought a further evidentiary hearing. The Petitioner saw no reason to do so and stood on its Petition (transcript, Septem-

ber 20, 1977, record below, page 91-92).

The United States claims that Respondent never contended that her sign came within the Oklahoma Acts exemption for on-premise signs, that the record is unclear on this issue, and that it would be helpful for the trial court to hold an evidentiary hearing on such issue (Amicus Curiae Brief, page 16-17). Again, this is incorrect. At the trial court level, in her Reply Brief in support of Defendant's Demurrer, Mrs. C. V. Pile noted that the only way her non-commercial sign could be located in her non-business area would be if it were construed to be an on-premise sign in which the activity conducted on the premises was the expression of the non-commercial opinion itself (record below, page 27). Petitioner did not adopt such a construction of the statute and did not choose to amend its Petition to state such a cause of action.

The case was decided as a matter of law by the trial court and by the Supreme Court of Oklahoma, and both parties have agreed that there was never any dispute as to any material fact, that there was no need for any further evidentiary hearings,

and that the issues were ones of law ready to be determined by the Courts.

Thus, the issues presently before this Court are, first, whether or not the decision of the Oklahoma Supreme Court is supported by a non-federal ground; and, second, if the decision below is not supported by a non-federal ground, whether or not the decision by the Oklahoma Supreme Court was in accord with applicable decisions of this Court.

I.

The decision of the Oklahoma Supreme Court is supported by an adequate and independent non-federal ground, namely, Article II § 22 of the Oklahoma Constitution. Mrs. Pile's Demurrer at the trial court below asserted that her non-commercial billboard message was not covered by the state statute because if it were, the statute would be unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Article II, § 22 of the Oklahoma Constitution. Said Demurrer was sustained by the trial court. The Oklahoma Supreme Court in its decision below quoted from said free speech section of the Oklahoma Constitution, acknowledged

that the trial court based its decision on the Federal Constitution "in addition to" the State Constitution, and affirmed the trial court's decision "in all respects." State v. Pile 603 P 2d 337, 339, 343 (Okl., 1979).

> This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case.
>
> . . . .
>
> . . . we would have jurisdiction to review only if the federal ground had been the sole basis for the decision, or the State Constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution. Mental Hygiene Dept. of Cal. v. Kirchner, 380 US 194, 197-198 (1965).

Obviously, the Federal Constitution was not the sole basis for the decision by the Oklahoma Supreme Court, nor did the Oklahoma Supreme Court state they were compelled by the Federal Constitution to interpret the State Constitution as they did. In their decision, the Oklahoma Supreme Court referred to the Oklahoma Con-

stitution first and then secondarily referred to the Federal Constitution "in addition to the guarantee of that right in the preceding excerpt from this State's Constitution." 603 P 2d at 339. It seems clear that, even if Mrs. Pile had not raised the United States Constitution, the Supreme Court of Oklahoma would have ruled precisely as it did based on the Oklahoma Constitution.

Thus, this case is not like those in which this Court has assumed jurisdiction because the State Court did not mention the State Constitution, or cited only Federal cases as controlling or compelling an interpretation of the State Constitution contrary to how they would have interpreted the State Constitution under State decisions. Zacchini v. Scripps-Howard Broadcasting Co., 433 US 562, 568 (1977).

Wherefore, the Petition herein for a Writ of Certiorari should be denied.

II.

Even if the decision below by the Oklahoma Supreme Court were not supported by an adequate and independent non-federal ground, the decision was in accord with applicable decisions of this Court and,

therefore, the Petition for a Writ of Certiorari should be denied.

A. The Brief for the United States, page 11, claims that the Oklahoma Supreme Court's decision is inconsistent with almost all other state decisions. This is simply not true. All cases cited by the United States, except for three, apply statutes regulating billboards to commercial signs only.

Of all the scores of cases nationwide dealing with statutes concerning municipal and governmental power as to billboards and outdoor advertising (see Respondent's Brief herein, May 12, 1980, pp 6-7), Petitioner and the United States have cited only three which apply billboard statutes to non-commercial messages.

One of these, Veterans of Foreign Wars v. City of Steamboat Springs, 195 Colo. 44, 575 P 2d 835, appealed dismissed, 439 US 809 (1978), is distinquishable from the case herein since Veterans dealt with regulations of signs extending over public property whereas the statute herein does not.

The other two cases, Washington v. Lotz, 92 Wash. 2d 52, 593 P 2d 811, appeal

dismissed, 444 US 921 (1979) and Donnelly Advertising Corp. v. Mayor and City Council of Baltimore, 279 Md. 660, 370 A. 2d 1127 (1977), are simply inconsistent with the case law in the United States which is overwhelmingly to apply general laws regulating billboards, including laws very similar to Oklahoma's and enacted pursuant to the same Federal statute, to commercial signs only.

In fact, one of the cases cited by the United States, Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P 2d 407, 164 Cal. Rptr. 510 (1980), appeal pending, No. 80-195, and cert. pending, No. 80-196, construed the statute therein precisely as the Oklahoma Supreme Court did in the case herein and adopted a "narrow construction limiting its proscription to those signs which clearly fall within the intendment of the enactment," namely, "commercial billboards" in order to avert the "danger that the ordinance might be construed to apply to signs of a character very different from commercial billboards" and "to avoid the risk of unconstitutional overbreadth which a broad construction of the ordinance might entail." Metromedia, supra, 610 P 2d at

410, n.2.

The only two cases cited by the United States and the position taken by the United States are inconsistent with the decisions of this Court as explained hereafter and by the decision of the Oklahoma Supreme Court below.

It should be noted that the four decisions of this Court cited by the United States in its Brief, page 10, dealing with billboard regulations all apply the statutes involved to commercial advertising and none of the four cases even involve free speech or discuss the First Amendment to the Constitution of the United States.

B. The Brief for the United States, page 13-14, states that the Oklahoma Act is not a "prior restraint" and that the highway is not a "public forum", contrary to the decision of the Oklahoma Supreme Court. The position of the United States is incorrect.

The Oklahoma Act authorizes the Department of Transportation to "implement and enforce this Act" (69 O.S. § 1271), said department having promulgated rules and regulations for the effective control

of outdoor advertising. There is nothing in the way of "narrow specificity" (NAACP v. Button, 371 US 415, 433 (1963)) in the Act in the way it regulates non-commercial signs if it is construed to so regulate said signs, especially since non-commercial signs are nowhere mentioned in the Act. 69 O.S. § 1277 authorizes the State Transportation Commission "to enact and adopt rules and regulations for the issuance of licenses and permits and the charging and collection of permit fees," apparently in whatever manner the Commission deems necessary and with no limitations on said rules and regulations as they pertain to non-commercial signs protected under the State and Federal Constitutions.

All such statutes stricken down by this Court have had one thing in common: "they gave public officials the power to deny use of a forum in advance of actual expression." Southeastern Promotions, Ltd. v. Conrad, 420 US 546, 552-553 (1975).

Doubtless there are other features of non-commercial billboards which may be regulated in the public interest, such as blinding lights or impairment of vision, "without prior licensing or other invasion

of constitutional liberty." Schneider v. State, 308 US 147, 165 (1939).

If non-commercial signs were construed to be exempt because related activities other than the sign itself were conducted on the premises, as the United States suggests in their Brief, page 16, n.12, the danger of prior restraints on First Amendment rights would increase since the public official's decision to issue or refuse the permit would involve the "appraisal of facts, the excersise of judgment, and the formation of an opinion" as to whether or not the sign related to the activities conducted on the premises. Cantwell v. Conneticutt, 310 US 296, 305 (1940).

Thus, the Oklahoma Supreme Court's decision that the Oklahoma Act is a prior restraint is correct.

Likewise, the decision below is correct in ruling that the highway is a "public forum". Schneider v. State, supra; Hague v. C.I.O., 307 US 496, 515 (1939); Baldwin v. Redwood City, 540 F. 2d 1360, 1366 (9th circuit 1976), cert. denied, 431 US 913 (1977). The reference to Justice Douglas' dicta in Lehman v. City of Shaker Heights, 418 US 298, 306 in the Brief for

the United States at page 14 has already been dealt with in Respondent's previous Brief herein at page 7.

Highways in Oklahoma are obviously a "public forum" for free speech such as billboards since highway billboards have traditionally been used for non-commercial messages in Oklahoma. All one has to do is look around and observe the numerous billboards being used during this campaign year by candidates to realize that highways are a significant "public forum" for free speech.

C. The Brief for the United States, page 15, claims that the Oklahoma Supreme Court erroneously ignored the logic of the distinction between on-premise signs and off-premise signs. The United States claims that such distinction has long been accepted by courts as a reasonable basis for differential regulations. However, every case cited by the United States to support its position applied the billboard statute under consideration to commercial messages only and not to non-commercial billboards. The distinction between on-premise signs and off-premise signs has <u>not</u> long been accepted by courts as a

reasonable basis for differential regulations between commercial signs and non-commercial signs.

It takes little imagination to illustrate the paradoxical scope of such a policy. For example, a cigarette factory located near a freeway could advertise the desirability of smoking its brand, but a cancer society could not advertise that cigarette smoking is hazardous to ones health. Or a theatre located along an interstate highway could advertise a motion picture that portrays sex and violence, but the Legion for Decency could not post a message for clean films. A lumber company could advertise its wood products, but a conservation group could not maintain a sign urging citizens to write to the President or Governor about protecting our natural resources. Obviously, the above non-commercial off-premise signs would not be as effective if they could not be located near the above described on-premises commercial billboards.

The interpretation by the Petitioner and the United States would raise commercial speech from "its subordinate posi-

tion in the scale of First Amendment values" and place it above pure speech concerning political issues which is entitled to the fullest and most urgent application of constitutional guarantees. Ohralik v. Ohio State Bar Association, 436 US 447, 455-456 (1978); Schneider v. State, supra, at 161; Monitor Patriot Co. v. Roy, 401 US 265, 272 (1971); California v. LaRue, 409 US 109, 117 (1973).

If Mrs. Pile's sign read "tomatoes for sale here," it would not be prohibited; but because it reads "Get US out of the United Nations," it is prohibited in a non-commercial zone if the Oklahoma Act is construed to apply to non-commercial signs. Thus, if applied to non-commercial signs, the Oklahoma Act prohibits Mrs. Pile's sign based on the content of said sign. Once one class is allowed to use a forum, government cannot exclude other classes from using the same forum based on the content of the speech. Police Department of Chicago v. Mosley, 408 US 92, 96 (1972).

This Court has ruled recently that the Public Service Commission of the State of New York could not justify its ban on the use of non-commercial mailing inserts

on the ground that consumers will benefit from receiving "useful" information, but not from the prohibited information. Consolidated Edison v. Public Service Commission, No. 79-134 (June 20, 1980), 48 LW 4776, 4777.

Just as the "Commission's own rationale demonstrates that it's action cannot be upheld as a content-neutral time, place, or manner regulation" (Id.), likewise, the Oklahoma Act prohibits non-commercial billboards while permitting on-premise commercial signs and "official signs" and "informational signs" "deemed to be in the interest of the traveling public." 69 Oklahoma Statues § 1273, 1274. Therefore, if applied to non-commercial signs, the Oklahoma Act would be justifying its ban on the ground that consumers will benefit from receiving information from on-premise, official and informational signs but not from non-commercial signs. As a result, the Oklahoma Act can not be upheld as a content-neutral time, place or manner regulation.

It is for precisely the above reasons and the others set forth in its decision that the Supreme Court of Oklahoma held

Respondent's non-commercial speech to be not regulated by the Oklahoma Act and thereby avoided the danger of unconstitutionality under the applicable case law of Oklahoma and Supreme Court of the United States.

CONCLUSION

Wherefore, for the foregoing reasons and authorities cited herein and in Respondent's earlier Brief, the Petitioners Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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